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I. Introduction

From time immemorial, salmon has occupied a dominant position in the culture of native coastal communities. This abundant resource not only provided Washington Indians with a food source[1] but was also a basis for their trading economy,[2] a means for maintaining social stratification, and a focal point of religion, and ceremony.[3] Salmon was at the very core of the aboriginal way of life. The smoked and dried fish were an important trading commodity, traded in high volume and over extensive geographic regions. Often the Indians bartered the fish for lumber, blankets, ceremonial masks, and later for kettles and guns.[4]

Along with their economic importance, anadromous[5] species were central to Indian culture. The harvesting season fostered social cohesion within the loosely-knit tribal groups by delegating specific harvesting functions to each community member. No one was overlooked: men caught the fish, women cleaned and smoked them, and children gathered firewood and helped clean the fish.[6] To these people, "fish were

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1. Sohappy v. Smith, 302 F. Supp. 899, 905-06 (D. Or. 1969), *aff'd*, 529 F.2d 570 (9th Cir. 1976) (noting aboriginal use of Columbia River salmon). *See also* AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 3 (1970).

2. United States v. Washington, 384 F. Supp. 312, 350, 358, 366-67 (W.D. Wash. 1974) (*Washington I*), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *see also* Albion Gile, *Note on Columbia River Salmon*, 56 OR. HIST. Q. 140, 142 (1955).

3. CHIEF MARTIN J. SAMPSON, INDIANS OF SKAGIT COUNTY 7 (1972).

4. *Id.* at 8.

5. Anadromous fish are those which spawn in fresh water, migrate to the ocean for the better part of their life cycle, and then return after a period of roughly two to five years to the rivers and streams of their origin to renew the cycle. These three stages of the life cycle characterize and differentiate anadromous fish from all other species. *See Washington I*, 384 F. Supp. at 405.

6. For background information on traditional economic and social life of Northwest tribes, see HERMAN K. HAEBERLIN & ERNA GUNTHER, THE INDIANS OF PUGET SOUND (1973); United States Indian Claims Commission volumes in the American Indian Ethnohistory series published on Northwest tribes by Garland Press (New York); and WAYNE SUTTLES, COAST SALISH ESSAYS (1987). See also *supra* notes 1-3.

. . . not much less necessary than the atmosphere they breathed."[7] With the colonization of the western United States, and with the white man's inexorable push west, came the alteration of native peoples' control of the fishery and the commercial harvesting of salmon.

In the mid-nineteenth century Congress appointed Isaac Ingalls Stevens to serve as governor of what is now Washington State and as superintendent of Indian Affairs for that region.[8] Stevens' job was to obtain as much of the Indian land as possible. Within one year (1854) Stevens had concluded treaty negotiations with more than 17,000 Indians, giving the new Washington Territory title to more than 64,000,000 acres of Indian land.[9]

Initially, these treaties did not have any practical effect or impact on the Indians. Few conflicts arose, for there was enough salmon and land for everyone. "Indeed, for a number of years white and Indian fishermen worked closely in harvesting the fish from the Columbia River."[10] Such a copacetic situation did not last for long.

As the gold rush attracted new frontiersmen, it attracted all the necessary ingredients for conflict:

> Land that had once belonged to the Indians, and was deeded to the Territory under the Stevens treaties, eventually fell into the hands of white salmon fishermen, who took no great delight in seeing a group of Indians regularly march across private property to plant their poles and nets in the now highly valuable "usual and accustomed" fishing places.[11]

As a result, the initial problem Indians in Washington faced was how to regain access to the fish.

Today, conflict among salmon-user groups has escalated as each sector of the salmon industry grows in its determination not to have a lesser share of a dwindling resource. Annual reductions in allowable catch, the economically insupportable number of salmon fishing vessels in the waters off the west coast of the United States, and the competition between United States, Canada, and Japanese fishers, between Indians and non-Indians, between sport and commercial fishers, between trollers and gill-netters, have all combined to undermine the economic viability of salmon fisheries. Fishery management problems are now chronic and the resource allocation situation has been de-

7. United States v. Winans, 198 U.S. 371, 381 (1905).

8. AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 1, at 18.

9. *Id.* at 19.

10. Gile, *supra* note 2, at 141.

11. Jack L. Landau, *Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest*, 10 ENVTL. L. 413, 419-20 (1980).

scribed, in a masterpiece of understatement, as "tense." In the words of the Director of the Oregon Department of Fish and Wildlife, salmon management has become such that "the measure of a good decision . . . is one which makes everyone equally mad."[12]

In Washington State the most heated and protracted fishing conflicts have been the battles between Indian and non-Indian fishers. Western Washington tribes, after decades of suffering the effects of being pushed out of the mainstream fishing economy, chose to fight back. Some of the "leaders said we can either stay in these concentration camps supported by the government or we can take risks and look for opportunities."[13]

The risk-taking activities first started in the mid-1950s with "fish-ins" — fishing in defiance of state law but in accordance with Indian interpretation of the treaties.[14] Open protests against restrictive state regulations by the Nisqually, Puyallup, and Muckleshoot Tribes in the 1960s led to arrests and confiscation of the tribes' gear. Tension mounted as the pace and the intensity of the confrontations increased. The explosive atmosphere of this period coupled with the "long years of non-understanding of Indian life by whites made it nearly impossible for either side to talk to each other."[15] A negotiated settlement was out of the question.

The conflict soon moved from the water to the courtroom. The first series of cases litigated in this region helped significantly to clarify the issues,[16] but it was Judge Boldt's landmark decision in *United States v. Washington* (*Washington I*)[17] that marked the turning point. Judge Boldt interpreted the treaties as securing for the tribes the right to 50% of the allowable catch.

II. Scope of Study

Commencing with *Washington I*, this article traces how the treaty tribes in western Washington reestablished their right to harvest salmon

12. John R. Donaldson, *Oregon's Salmon Future, in* SCIENCE, POLITICS AND FISHING 39 (N. Krant ed., 1981).

13. Interview with Terry Williams, Director of Fisheries Department, Tulalip Tribe and Commissioners, Northwest Indian Fisheries Commission (Apr. 18, 1990).

14. FAYE G. COHEN, TREATIES ON TRIAL - THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 65 (1986).

15. *Id.* at 107 n.8.

16. The Puyallup trilogy consists of Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (*Puyallup I*), Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (*Puyallup II*), and Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) (*Puyallup III*). The cases ultimately held that 45% of the harvestable natural steelhead run on the Puyallup River was available for the taking by the treaty Indians' net fishery and 55% by the non-Indian sport fishery. Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969), affirmed the Columbia River treaty tribes' right to a fair and equitable portion of the fish going through their usual and accustomed fishing places.

17. 384 F. Supp. 312 (W.D. Wash. 1974).

under the treaties signed with Governor Stevens in the middle of the nineteenth century. *United States v. Washington*[18] was not the first case to deal with Indian treaty fishing rights; litigation in this area occurred for years. *Washington I* has been selected as the starting point of this article because, while commentators at that time heralded it as the final act in a long and bloody battle, Judge Boldt's pivotal decision instead ignited a new round of controversy and conflict. The courtroom battle would soon be identified as simply the next stage in the ongoing fight for fishing rights.

In the sixteen years since Judge Boldt promulgated his decision, new conflicts between Indians and non-Indians have emerged as old conflicts are resolved. The second part of this article surveys and explains the nature of these current conflicts that plague the Indian fishers of western Washington. Currently, there are fifteen subproceedings pending and the tribes have further identified nine general areas where the tribes anticipate litigation. This new round of litigation differs from the earlier, post-Boldt cases in that a greater percentage of these new disputes are between tribes, as opposed to Indian versus non-Indian. Finally, this article concludes with a critical evaluation of *United States v. Washington*, its repercussions, and its impact on the treaty tribes and the fishery resource.

The ultimate aim of this article is twofold. First, by surveying litigation that is anticipated or pending under the continuing jurisdiction of the district courts, the article serves as an update on the current status of Indian treaty fishing rights in western Washington. Second, by treating Judge Boldt's decision together with all the connected and resulting litigation as a case study, the article identifies the further reaching effects and implications that judicially resolved treaty rights disputes generate.

III. United States v. Washington

On September 18, 1970, the United States, on behalf of seven treaty tribes (Puyallup, Nisqually, Muckleshoot, Skokomish, Makah, Quileute, and Hoh),[19] filed a complaint against Washington State seeking a declaratory judgment concerning protection of off-reservation treaty-right fishing and injunctive relief to provide enforcement of those rights.[20] The geographical setting is that portion of Washington State

18. The use of *United States v. Washington* refers to both *Washington I*, 584 F. Supp. 312 (W.D. Wash. 1974), and *Washington II*, 506 F. Supp. 187 (W.D. Wash. 1980).

19. *Washington I*, 384 F. Supp. at 327.

20. These tribes were later joined by the Lummi Tribe, Quinalt Tribe, Sauk-Suiattle Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit River Tribe, and the Yakima Nation. Eventually twenty-one tribes were included as parties.

west of the Cascade Mountains and north of the Columbia River drainage area, and includes the American portion of the Puget Sound watershed, the Olympic Peninsula watersheds north of the Grays Harbor watershed, and the off-shore waters adjacent to those areas.[21]

Before the case came to trial, the parties agreed to divide the issues into two phases. Phase I (*Washington I*) dealt with the issue of whether Indians had treaty rights to fish off their reservations, and if so, whether the treaties reserved to the tribes a specific percentage of fish. Phase II (*Washington II*) then considered whether hatchery-bred fish and artificially-propagated fish would be included in calculating the Indian allocation and whether the treaties guaranteed the continued protection of the salmon against destruction of the salmon's habitat.[22]

United States v. Washington was not only very complicated from a legal perspective, but it also came to court in a climate of heated political antagonism. The resulting decision had a far-reaching impact on all the parties and could potentially restructure tribal societies. The conflict exerted tremendous pressure on the court, a type of pressure with which judges are usually not confronted. Nevertheless, Senior District Court Judge George H. Boldt intended to

> determine every issue of fact and law presented and, at long last, thereby finally settle, either in his decision or on appeal thereof, as many as possible of the divisive problems of treaty right fishing which for so long have plagued all of the citizens of this area, and still do.[23]

A. Phase I

1. District Court Decision

Judge Boldt determined that all the legal issues and factual determinations must be characterized and evaluated according to the treaty language reserving fishing rights to the tribes.[24] Judge Boldt held that the treaty itself must be interpreted in the "spirit and manner" directed by the Supreme Court:

> And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protec-

21. *Washington I*, 384 F. Supp. at 328.

22. United States v. Washington, 506 F. Supp. 187, 190 (W.D. Wash. 1980) (*Washington II*).

23. *Washington I*, 384 F. Supp. at 330.

24. See appendix I of this article for the full text of Treaty of Medicine Creek, Dec. 26, 1854, U.S.-Nisqually, et. al., 10 Stat. 1132.

> tion," and counterpoise the inequality "by the superior justice which looks only to the substance of the right, without regard to the technical rules."[25]

Judge Boldt's interpretation of the following clause not only protected and secured for Indians the right to fish off the reservation, but his interpretation also reserved for the tribes a specific amount of the fish. All the treaties Isaac Stevens signed with the western Washington tribes contained essentially the same critical provision. That provision in the Medicine Creek Treaty read, "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . . ."[26]

Aided by the use of a dictionary, Judge Boldt made his most far-reaching ruling. He held that the treaty provision did indeed provide the treaty tribes with a treaty-based right to fish and also reserved a specific amount of fish for the tribes. Judge Boldt concluded that "'in common with' means *sharing equally* the opportunity to take fish at 'usual and accustomed grounds and stations;' therefore, nontreaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish . . . and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish . . . ."[27]

Judge Boldt also called for an equitable adjustment to be determined from time to time. This adjustment was meant to augment the tribes'

25. United States v. Winans, 198 U.S. 371, 380 (1905) (citing Choctaw Nation v. United States, 119 U.S. 1 (1886); Jones v. Mechan, 175 U.S. 1 (1899)). Judge Boldt also identified other Supreme Court decisions that employed the same approach to treaty interpretation. *Washington I*, 384 F. Supp. at 331. *See* Tulee v. Washington, 315 U.S. 681, 684-85 (1942); Seufert Bros. v. United States, 249 U.S. 194, 198 (1919); *Jones*, 175 U.S. at 11; *Choctaw Nation*, 119 U.S. at 27-28; The Kansas Indians, 72 U.S. (5 Wall.) 737, 760 (1866); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552-62 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 14-20 (1831).

26. *Washington I*, 384 F. Supp. at 349; *see* Treaty of Medicine Creek, Dec. 26, 1854, U.S.-Nisqually et al., 10 Stat. 1132. The other treaties Isaac Stevens, Governor and Indian Agent of the Washington Territory in the 1850s, negotiated were: Treaty of Point Elliott, Jan. 22, 1855, U.S.-Dwamish et al., 12 Stat. 927; Treaty of Olympia, July 1, 1855 & Jan. 25, 1856, U.S.-Quinaielts, 12 Stat. 971; Treaty of Point No Point, Jan. 26, 1855, U.S.-S'Klallams, 12 Stat. 933; Treaty of Neah Bay, Jan. 31, 1855, U.S.-Makah, 12 Stat. 939.

27. *Washington I*, 384 F. Supp. at 343 (emphasis supplied) (citation omitted). Excluded from this 50-50 sharing formula were: (1) fish that Indians catch on reservations; (2) fish taken at off-reservation sites other than the tribes' usual and accustomed fishing grounds; (3) fish that Indians catch for ceremonial and subsistence needs; and (4) fish that are necessary for spawning escapement. *Id.* Thus, the total population of fish in these four categories are to be subtracted from the total anticipated run before the size of the harvestable run can be determined.

share and compensate them for the "substantially disproportionate" numbers of fish caught offshore by non-treaty fishermen that would have otherwise passed through the tribes' fishing grounds.[28]

The *Washington I* court also ruled on the regulatory powers of the state and the tribes, as well as the enforcement and management of fishing regulations. Judge Boldt explained that since the treaty tribes' right to take "anadromous fish arises from a treaty with the United States, that right is preserved and protected under the supreme law of the land, does not depend on State law, is distinct from rights or privileges held by others, and may not be qualified by any action of the State."[29]

Recognizing that in the past the state had unlawfully restricted Indian fishing under the guise of "conservation regulations," Judge Boldt was careful to delineate exactly how, when, and why the state could step in and regulate the Indians' treaty right to fish. The state is authorized to regulate the fishery only for conservation purposes aimed to preserve and maintain the resource. Such regulations must not discriminate against the treaty tribes' right to fish, must meet appropriate standards of substantive and procedural due process, and the state must show that its conservation objective could not be met by restricting non-Indian fishermen.[30]

The Ninth Circuit affirmed Judge Boldt's decision and the propriety of the district court's continuing involvement in the case.[31] With this approbation the case was remanded to the district court so that the court could maintain continuing jurisdiction. As District Judge Burns recognized, this affirmation "also involves ratification of the role of the district judge as a 'perpetual fishmaster.'"[32] While this supervision is not the usual role of a judge, this case is not typical. Washington State's failure to implement the decision coupled with

> the history set forth in the [*Department of Game v. Puyallup Tribe*[33]] and [*State v. Antoine*[34]] cases, among others, make it crystal clear that it has been the recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court.

28. *Id.* at 343-44.
29. *Id.* at 407.
30. *Id.* at 407-08.
31. United States v. Washington, 520 F.2d 676 (9th Cir. 1975) (*Washington II*).
32. *Id.* at 693 (Burns, J., concurring).
33. 422 P.2d 754 (Wash. 1967), *aff'd and remanded*, 391 U.S. 392 (1968).
34. 511 P.2d 1351 (Wash. 1973) (en banc), *rev'd*, 420 U.S. 194 (1975).

> This responsibility should neither escape notice nor be forgotten.[35]

Finally, the United States Supreme Court declined to review *Washington I*,[36] thus ensuring that Judge Boldt's decision was the law of the land.

A law is of little use if it is not enforced. Because county prosecutors and judges dismissed almost all citations, illegal fishing on a grand scale continued and even increased. The situation was marked by confrontation and violence between Indians and non-Indians.

In an attempt to bring some order to this chaos, Judge Boldt established the Fisheries Advisory Board (FAB), to resolve disputes as they arose and before they reached court. The FAB consisted of three individuals: one tribal representative, one state representative, and a chairperson.[37] The chairperson's role was to encourage negotiated agreements, and if the situation arose where the parties could not agree, the chairperson recommended a solution. While this chairperson remained unchanged, both the tribal and state representative changed depending on the issues and parties involved in a particular dispute.

Attempts to subvert the *Washington I* decision continued and culminated in 1977 with two decisions handed down by the Washington State Supreme Court: *Puget Sound Gillnetters Ass'n v. Moos*[38] and *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*.[39]

In *Puget Sound Gillnetters*, the petitioners, an individual and a commercial fishing association, filed an action against the Washington State Director of Fisheries seeking a writ of mandamus requiring the director to restrict fishing regulations to those necessary for conservation and to treat Indian and non-Indian fishermen equally.[40] The Department of Fisheries, as respondent, was put in the position of essentially arguing to uphold the ruling in *Washington I* — a decision it clearly disliked. One has to wonder, then, if the respondent's case was argued as vigorously as it should have been.

The state supreme court neither considered itself bound to follow the decision of the Ninth Circuit, nor did it acknowledge that the United States Supreme Court had denied certiorari. This was justified by Judge Rosellini, writing for the majority: "Being cited no authority

35. *Washington II*, 520 F.2d at 693 (Burns, J., concurring).

36. Washington v. United States, 423 U.S. 1086 (1976).

37. Dr. Richard Whitney, professor at the College of Fisheries at the University of Washington, was appointed by Judge Boldt as the permanent chair.

38. 565 P.2d 1151 (Wash. 1977).

39. 571 P.2d 1373 (Wash. 1977).

40. *Puget Sound Gillnetters*, 565 P.2d at 1152.

for the proposition that federal district courts have exclusive jurisdiction to construe Indian treaties — treaties which affect important interests of the state — we adhere to our own interpretation of the treaty. This interpretation we believe, results in fairness and justice to all fishermen."[41]

Judge Rosellini continued, holding that the Department of Fisheries can only regulate fishing for conservation purposes and that equal protection concepts prevented the allocation of fish "to any user of the same class, that every fishermen in a class must be treated equally, and that each should be given an equal opportunity to fish within lawful statutes and regulations."[42]

On November 23, 1977, six months after *Puget Sound Gillnetters*, the same court handed down an almost identical decision. In *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*,[43] Judge Rosellini affirmed his earlier decision in *Puget Sound Gillnetters* but with a more explicit rationale:

> We hold that the director of the Department of Fisheries of the State of Washington does not have the authority to apportion fish to conform to the Federal District Court decision, that the Federal District Court cannot compel a state officer to act beyond his statutory authority, and that the granting of more than 50 percent of the harvestable fish to 0.28 percent of the population (treaty Indians) and less than 50 percent to 2,243,069 non-Indian population, violates the equal protection clause of the fourteenth amendment to the United States Constitution.[44]

This pronouncement left the Director of Fisheries in a very awkward situation. If he followed this decision and failed to allocate the fish between the Indian and non-Indian fishers, he would be in contempt of the United States district court order. On the other hand, if the Director did allocate the fish between the Indian and non-Indian fishers, he would risk being in contempt of the Washington State Supreme Court order.

It was here that Judge Boldt stepped in and assumed responsibility for allocating fish to Indians and later to non-Indians. This authority was later affirmed by the Ninth Circuit in *Puget Sound Gillnetters Ass'n v. United States District Court*,[45] and his job as fishmaster continued until 1978.

41. *Id.* at 1158.
42. *Id.* at 1159.
43. 571 P.2d 1373 (Wash. 1977).
44. *Id.* at 1378.
45. 573 F.2d 1123 (9th Cir. 1978).

2. United States Supreme Court Decision

Almost five years after Judge Boldt's initial decision in *Washington I* and two years after the United States Supreme Court denied certiorari, the United States Supreme Court agreed to review the case because (1) the commercial fishermen's cases had been decided and had created a clash between the state and the federal court systems — a confrontation which the United States Supreme Court undoubtedly viewed with concern; (2) the non-Indian commercial fishermen's defiance of the Boldt decision had led to chaos; and (3) in a highly unusual move, "the United States Justice Department — which had brought *United States v. Washington* on behalf of the tribes — had acquiesced to the state's request for review."[46]

The United States Supreme Court, hoping to resolve the issue once and for all, heard *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*[47] together with *Washington v. United States (Washington I)*[48] and *Puget Sound Gillnetters Ass'n v. United States District Court.*[49]

In a 6-3 majority, the United States Supreme Court upheld virtually all Judge Boldt's decisions and overruled the state court decisions as contrary to the federal court orders.[50] Justice Stevens, writing for the majority, affirmed the 50-50 allocation but stated that this should be viewed as a maximum ceiling, which would be reduced if tribal needs could be satisfied by a lesser amount.[51] The Supreme Court further held that fish taken by Indians on their reservations should be included in their 50% share, including fish taken by Indians for ceremonial and subsistence needs.[52]

B. Phase II

1. District Court Decision

In August 1976 the plaintiffs formally commenced *United States v. Washington (Washington II).*[53] A flurry of amended and supplemental complaints, followed by answers and counterclaims, helped to narrow and focus the issues. The first issue was whether hatchery-reared fish were included in the tribes' allocation. The second issue was whether the "federal treaty fishing right reserves to treaty tribes a right to have

46. COHEN, *supra* note 14, at 109.
47. 443 U.S. 658 (1979).
48. *Washington I*, 384 F. Supp. at 312.
49. 573 F.2d 1123 (9th Cir. 1978).
50. *Washington State Commercial*, 443 U.S. at 660.
51. *Id.* at 670, 685-86.
52. *Id.* at 688.
53. 506 F. Supp. 187 (W.D. Wash. 1980).

the fishery resource protected from adverse environmental actions or inactions of the State of Washington."[54]

District Judge Orrick granted the tribes' motion for summary judgment holding that fish reared in all hatcheries, Indian and non-Indian, were to be included in the total fish allocation. Judge Orrick also granted the tribes' motion for partial summary judgment holding that the right of taking fish includes the right to preserve the supply of fish by protecting the habitat. The court held that the treaty assures the tribes something considerably more tangible than "merely the chance . . . occasionally to dip their nets into the territorial waters."[55] After all, the "most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[56] Judge Orrick concluded that the treaties reserved a sufficient quantity of fish to satisfy the tribes moderate living needs, but the tribes allocation would be subject to a ceiling of 50% of the harvestable run.[57]

2. United States Court of Appeals Decision

The Ninth Circuit affirmed the hatchery summary judgment and partially reversed the district court's environmental right ruling.[58] Judge Sneed, writing for the court, found that the treaty terms implied a duty on the state to take reasonable steps to protect the fish resource from degradation.[59] The duty requires the state to take "reasonable steps commensurate with State resources and abilities to preserve and enhance the fishery."[60] Unfortunately, the court did not define "reasonable steps," including whether or not past or present state habitat protection efforts could be considered "reasonable."

The state petitioned for an en banc rehearing. Granting the rehearing,[61] the Ninth Circuit vacated its earlier opinion, and the case was reargued to an eleven-judge en banc panel.[62] In a per curiam opinion, the court instructed the trial court to vacate its judgment regarding the environmental aspect of the case.[63] The court thought it contrary to the "exercise of sound judicial discretion" to issue a declaratory judgment on the environmental issue at this time. Rather than use the declaratory judgment procedure "to announce legal rules imprecise in

54. *Id.* at 194.
55. *Id.* at 203 (quoting *Washington I*, 443 U.S. at 679).
56. *Id.* at 203.
57. *Id.* at 208.
58. United States v. Washington, 694 F.2d 1374 (9th Cir. 1983).
59. *Id.* at 1375.
60. *Id.* (footnote omitted).
61. 704 F.2d 1141 (9th Cir. 1983).
62. 759 F.2d 1353 (9th Cir. 1985) (per curiam).
63. *Id.* at 1355.

definition and uncertain in dimension,"[64] the court felt it prudent to wait for another case where definite and concrete state actions are in question so that "the measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute."[65]

The *Washington II* court affirmed the district court's judgment granting a declaratory judgment on the hatchery fish issue. All fish reared in hatcheries, whether Indian or non-Indian, were to be included in the total fish to be allocated.

Four factors favored affirmance of the district court's decision to include hatchery-fish: "(1) the lack of state ownership of the fish once released; (2) the lack of any unjust enrichment of the Tribes; (3) the fact that hatchery fish and natural fish are not distinguished for other purposes; and (4) the mitigating function of the hatchery fish programs."[66] The court found it only just and equitable that the hatchery fish be included in the total number of fish subject to allocation.

Judges Sneed and Anderson, who also sat on the panel which initially heard the case, concurred with the per curiam opinion, stating that "[t]here comes a time, however, in a collegial body in which it is better to reach an agreement that is tolerable by a majority than it is to adhere to one's preferred position. This is such a time."[67]

Judges Ferguson and Schroeder also concurred with the majority. However, they would have vacated the district court's judgment pertaining to the "environmental degradation issue because of the absence of a case or controversy in the present posture of the litigation."[68]

Judges Nelson, Skopil, and Norris concurred that hatchery fish are fish within the meaning of the treaty clause but dissented from the majority's statement of the proper standard of review. They concluded that the district court properly invoked the mechanism of declaratory relief on the environmental issue. "While it may be unable to resolve all potential disputes between the parties, declaratory relief would clarify and settle the legal relations in issue and would afford substantial relief from the uncertainty the parties face."[69] Judge Poole, believing that the court was without jurisdiction to entertain this appeal, dissented.[70]

IV. Current Concerns — Current Conflict

Despite the United States Supreme Court's resounding affirmation of Judge Boldt's decision, the conflict and controversy remained and

64. United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985).
65. *Id.*
66. *Id.* at 1359.
67. *Id.* at 1360 (Sneed, J., concurring).
68. *Id.* (Ferguson, J., concurring).
69. *Id.* at 1365 (Nelson, J., concurring in part and dissenting in part).
70. *Id.* at 1368 (Poole, J., dissenting).

vigorous litigation continued. The district court settled most of the disputes but many have reached the Ninth Circuit.[71] Phillip E. Katzen, staff attorney of Evergreen Legal Services, recalls that even toward the end of 1983 there was no sign of a slowdown in the litigation, and if anything, it was accelerating.[72] This occurrence was probably of little surprise to Judge Boldt as the district court retained continuing jurisdiction over *United States v. Washington* to determine further issues that might arise.

Currently, there are fifteen subproceedings pending in the Ninth Circuit.[73] The tribes have further identified nine general areas where litigation is possible or likely in the near future. It is important to note that the parties to these disputes have changed. No longer are these Indian versus non-Indian conflicts. The great majority of these disputes are now either inter-tribal or intra-tribal.

A. Inter-Tribal and Intra-Tribal Conflicts

1. North-South Sound Treaty Allocation

The Nisqually, Squaxin Island, Puyallup, and Muckleshoot tribes, located in the south Puget Sound region, are concerned that they will be barred from harvesting the salmon that originate in their rivers and streams. The salmon migrate north through Puget Sound into open ocean where they live until they return to spawn in their natal streams or river. While en route to the south Puget Sound rivers, the salmon pass through the usual and accustomed fishing sites of most northern-based tribes. This route concerns the south Puget Sound tribes.

Now that the north Puget Sound tribes have tremendous harvesting capabilities, the south Puget Sound tribes are concerned that this translates into a diminished or nonexistent harvest opportunity for them. Vigorous harvesting activity in the north could lead to two results detrimental to south Puget Sound tribal fishing interests. First, the total Indian allocation could be reached by the north Puget Sound tribes before the fish reach the south Puget Sound and before the south Puget Sound tribes have an opportunity to harvest them. Second, the runs bound for the streams and rivers in the south Puget Sound

71. *See* United States v. Washington, 641 F.2d 1368 (9th Cir. 1981); United States v. Washington, 642 F.2d 1141 (9th Cir. 1981); United States v. Washington, 645 F.2d 749 (9th Cir. 1981); United States v. Washington, 694 F.2d 1374 (9th Cir. 1982); United States v. Washington, 730 F.2d 1314 (9th Cir. 1984); United States v. Washington, 759 F.2d 1353 (9th Cir. 1985); United States v. Washington, 761 F.2d 1404 (9th Cir. 1985); United States v. Washington, 761 F.2d 1419 (9th Cir. 1985); United States v. Washington, 764 F.2d 670 (9th Cir. 1985); United States v. Washington, 774 F.2d 1470 (9th Cir. 1985).

72. Interview with Mr. Phillip Katzen, Staff Attorney, Evergreen Legal Services (Apr. 13, 1990).

73. *Id.*

could be so heavily harvested by the activities of the north Puget Sound tribes that the few returning spawners represent the minimum escapement necessary to preserve the run and therefore must not be harvested due to conservation concerns and constraints.

North-south Puget Sound allocation conflicts such as these are bound to grow in frequency and severity. Only recently have the tribes become capable of harvesting their total allocation. The Lummi Tribe, for example, has dramatically increased its purse seine[74] fleet from two vessels in 1974 when the district court handed down its decision in *Washington I* to thirty-five in 1986. It is expected that their purse seine fleet will continue to increase over the next eight years unless the government imposes restrictions to limit entry.[75]

On September 8, 1986, the Nisqually, Squaxin Island, Puyallup, and Muckleshoot tribes requested a determination of their treaty and equitable rights to shares of salmon originating from south Puget Sound.[76] The court has signed an agreed order for mediation of this dispute. The results of this mediation are still unknown.

2. *Tribal Members Fishing Under the State Licenses*

Treaty tribal members are not barred by the state from acquiring state fishing licenses. A tribal member could conceivably fish on open tribal fishing days as well as the open days set by the state. Terry Williams, director of the Tulalip Fisheries Department, is concerned because the fish caught by tribal members using state fishing licenses still count against the total tribal allocation. "These fishermen are stealing from the Indian fisherman that do not have state fishing licenses . . . they are double-dipping."[77] Double-dipping not only affects Indian and non-Indian allocations, but also affects international allocations as well.[78]

The Tulalip Tribe and other tribes experiencing the same problem have attempted to control this activity internally, but to no avail. The Tulalip Tribe and the Swinomish Tribe now feel compelled to bring this problem before the district court. Both the Tulalip Tribe and

74. A "purse seine" vessel sets a net that hangs perpendicular to the bottom. The net is laid in a huge circle around a school of fish and then both ends are pulled in simultaneously. The fish are trapped inside the circle and are drawn upwards and into the boat.

75. Daniel L. Boxberger, *The Lummi Indians and the Canadian/American Pacific Salmon Treaty*, 12 AM. INDIAN Q. 308-09 (1988).

76. Joint Tribal Statement Re: Status Conference of September 13, 1989, Subproceeding 86-5: North-South Sound Treaty Allocation, United States v. Washington Civ. No. 9213 (W.D. Wash. filed Sept. 18, 1970).

77. Interview with Terry Williams, Director of Fisheries Department, Tulalip Tribe and Commissioner of Northwest Indian Fisheries Commission (Apr. 18, 1990).

78. *Id.*

Swinomish Tribe are expected to file requests challenging the use of state licenses by some members of some tribes to fish on days when fishing is closed to tribal members.

3. *Calls to Reevaluate the Boundaries of Usual and Accustomed Fishing Sites*

In the years following the Boldt decision, the Lummi Tribe's fleet grew dramatically. The number of purse seine[79] vessels increased from two in 1974, to thirty-three in 1985. The number of skiff gill net[80] vessels increased from thirty-five in 1974 to over two hundred in 1985, and the number of power gill net boats jumped from half a dozen in 1974 to over one hundred in 1985.[81] This represents a jump from forty-three vessels in 1974 to over 335 vessels in 1985. Not all treaty tribes have developed their fishery in this way. Many of the tribes are primarily restricted to terminal area fisheries and cannot develop the more lucrative marine fishery.

The Lummi fishery is more valuable than many other tribes' fisheries primarily because of its geographical location. The Strait of Juan de Fuca falls within the Lummi usual and accustomed areas Lummi fishers can choose to fish the more valuable Fraser River-bound sockeye runs and ignore the Puget Sound chum runs. This leads to a large discrepancy in harvesting opportunities and activities between some tribes. "[B]y 1985 Lummi was the strongest fishing tribe in the State of Washington taking, in two previous years, close to half of the entire allocation for the twenty-four Western Washington Treaty Tribes."[82] The Lummi generally take 90% of the treaty share of sockeye, even though they only comprise 20% of the total Indian fleet. This uneven distribution of the resource has generated animosity and conflict among the treaty tribes.

On March 3, 1989, the Skokomish, Port Gamble Klallam, Lower Elwa Klallam, and Jamestown Klallam tribes filed a request for determination regarding the Lummi Tribes usual and accustomed fishing sites.[83] These tribes are particularly interested as to whether or not the Strait of Juan de Fuca, Discovery Bay, and Admiralty Inlet are included in the Lummi usual and accustomed sites identified in *Washington I.*

79. *See supra* note 74.

80. A "gill net" vessel simply hangs a wall of mesh netting perpendicular to the bottom. The net is laid in a straight line and is fastened to the bottom by stakes or an anchor.

81. Joint Tribal Statement Re: Status Conference of September 13, 1989, at 303, United States v. Washington, Civ. No. 9213 (W.D. Wash. filed Sept. 18, 1970).

82. *Id.* at 302.

83. *Id.* at 10.

B. State-Tribe Conflicts: The Fight for Shellfish and Other Non-Anadromous Special

Shellfish resources have been a mainstay of coastal Indian society and culture for thousands of years. A great variety of shellfish were utilized for ceremonial, subsistence, and commercial purposes, but most notable was the special role shellfish played as a crisis food. Shellfish were always available as a readily accessible food source. If a salmon run was depleted or wiped out, or an individual was no longer able to obtain other foods, shellfish was used as the alternative because it was always available and readily accessible.[84]

The significance of shellfish to Indian culture was recognized by Isaac Stevens and reserved in the treaties he drafted between 1854 and 1855. The pertinent clause reads, "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; . . . Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens."[85] No other treaties ratified with the United States expressly reserve shellfish rights for the tribes.

The tribes' ability to harvest shellfish to satisfy their basic needs has been radically truncated. This drastic result has been caused by a combination of factors. First, the sale and lease of tidelands from the state to private parties who refuse to permit access to Indians has effectively eliminated these areas from tribal reach. State- and federally-owned tidelands are currently the only areas available to the general public. Compared to the estimated 1,952 miles of shoreline in Puget Sounds, San Juan Islands, and Strait of Juan De Fuca, the remaining tidelands open to the public are limited to about twenty-one miles.[86]

Second, Indian harvest was further reduced by state policy and legislation that limited shellfish harvests for any purpose. The state was concerned with preserving and protecting the resource from depletion and thus invoked these measures in the name of conservation.[87]

Third, the shellfish are being destroyed by pollution, by waterfront development projects, by non-Indian over-harvesting, and by the introduction of shellfish predators. The resultant resource depletion, when coupled with state prohibition of off-reservation crab and shrimp harvests and state-imposed time, area, and gear restrictions, has the combined effect of exerting extreme harvest pressure on the few re-

84. *Id.* at 14.

85. Treaty of Medicine Creek, Dec. 26, 1854, U.S.-Nisqually et al., art. III, 10 Stat. 1132.

86. Northwest Indian Fishery Comm'n, Shellfish—The Tribal Perspective 5 (1989) (unpublished report).

87. Joint Tribal Statement Re: Status Conference of September 13, 1989, at Subproceeding 89-3: Tribal Request for Declaratory and Injunctive Relief Re: Shellfish, United States v. Washington, Civ. No. 9213 (W.D. Wash. filed Sept. 18, 1970).

maining public tidelands.[88] These areas cannot support these harvesting activities and survive.

Once the privately-owned tidelands are subtracted from the amount of tidelands available, and the contaminated, inaccessible, and unsuitable tidelands are no longer available, the tideland available to the tribes is extremely limited.[89] At present this limited space is open to the general public, both Indian and non-Indian. Bill Frank, Jr., chairman of the Northwest Indian Fisheries Commission, has asserted that "the shellfish resources that belong to all were never intended to be put in the private hands of a few individuals who own beachfront property."[90]

While *Washington I* addressed the allocation issue with regard to anadromous species, it failed to consider non-anadromous species. The district court, in exercising continuing jurisdiction over the case, entered a compilation of major post-trial substantive orders.[91] The court held that:

> In order to be entitled to exercise off-reservation treaty fishing rights to nonanadromous fish and shellfish, any tribe party to this case shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty entitlements to such nonanadromous fish and shellfish upon which the court may make a preliminary determination as to the tribe's entitlement to such species, pending final determination of tribal treaty-right entitlement to nonanadromous fish and shellfish . . . .[92]

For the last four years, the Washington Department of Fisheries and the Puget Sound tribes have been successfully negotiating shellfish agreements. Much progress has been made as evidenced by the state's growing awareness of all that the tribes have to offer. Tribal involvement means another source of resource management funding and adds teeth to habitat protection schemes in that such schemes are now based on judicially recognized treaty rights.[93]

Despite the notable progress in negotiations, agreement has not been possible. The state refuses to open to Indians tidelands that are privately owned or leased by the state. The parties waited hoping something would break the impasse. In the meantime, tribal members

88. *Id.*

89. *Tribes Seek Ruling on Treaty Shellfish Rights*, NEWS (Northwest Indian Fisheries Comm'n), vol. 15, no. 3, 1989, at 5.

90. *Id.*

91. United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1979).

92. *Id.* at 1037.

93. Interview with Steve Robinson, Public Relations Officer, Northwest Indian Fisheries Commission, Olympia, Washington (Apr. 5, 1990).

harvesting shellfish in Kitsap County were being harassed and threatened by property owners, being prosecuted in state courts, and having their boats and harvesting gear seized. Four Suquamish and Port Gamble Klallam tribal members were arrested by Kitsap County law enforcement officials for harvesting shellfish at off-reservation sites.[94]

Initially these were characterized as civil rights cases filed on their own behalf in federal court.[95] Concerned that the shellfish issue would be tried there, in cases the treaty tribes are not a party to, the tribes took control of the cases. The treaty tribes filed suit in federal district court to request a determination that they may exercise off-reservation treaty fishing rights for shellfish.[96] The tribal request for declaratory and injunctive relief regarding shellfish asks the court to declare:

> (1) that all species of shellfish found within the tribes usual and accustomed fishing grounds and stations are within the "right of taking fish" reserved by the Stevens treaties;
>
> (2) that the shellfish treaty right is limited only by (a) the need to perpetuate a species (with an appropriate margin of safety), (b) the provision for sharing the resource with all non-Indian citizens pursuant to the "in common with" language of the treaties, and (c) the exclusion of "beds, staked or cultivated by citizens," as that phrase would have been understood by the Indians at treaty time; and
>
> (3) that neither ownership nor possession of tidelands or bedlands by the state or private parties, through sale, lease or otherwise, may defeat, interfere with or diminish tribal treaty shellfish harvesting rights, nor bar access to tidelands or bedlands for harvesting purposes.[97]

Very little has occurred since the filing. There are two major procedural disputes that are awaiting a decision by the judge. Everything else is on hold until those issues are decided.[98] But this could simply be the calm before the storm. The conflict and controversy surrounding this dispute is expected to reach the fever pitch reached in the district court's hearing of *United States v. Washington*. After all, the private owners of the tidelands in question are more coherent and better

94. *Tribes Sue for Fishing Rights on Private Lands*, MORNING NEWS TRIB. (Olympia, Wash.), May 21, 1989, at col. 2.

95. *See* Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991) (Indians claiming unreasonable arrest, unreasonable search and seizure, interference with treaty rights, and denial of equal protection by the county).

96. Joint Tribal Statement Re: Status Conference of Sept. 13, 1989, at Subproceeding 89-3: Tribal Request for a Declaratory and Injunctive Relief Re: Shellfish, United States v. Washington, Civ. No. 9217 (W.D. Wash. filed Sept. 18, 1970).

97. *Id.*, Subproceeding 89-3 at 1-2.

98. Interview with Phillip Katzen, *supra* note 72.

organized than the commercial and sport fishers and collectively possess a considerable amount of political influence.[99]

The private tideland owners fear that if the tribes prevail, the value of their property will diminish.[100] This fear is mistakenly premised on the belief that the tribes will harvest the shellfish to the point of extinction. Since the tribes harvest shellfish by hand, the impact on the resource is a fraction of the impact exerted by the non-Indian mechanized harvesting technique. The resource would be in better hands if the tribes cared for it. The tribes are the leaders in habitat protection and give enhancement efforts the highest priority. Their goal is to increase the viability of the resource. Washington State has commented that if forty acres of Puget Sound tidelands were enhanced, the amount of clams available would be quadrupled.[101] As with the fishery resource, the tribes strive for the long-term viability of the resource and have the resource management funding and the treaty based power to protect the habitat. Therefore, if the commercial growers, recreational harvesters, and Washington State residents are seriously interested in having clams in this state, then the tribes are the best friends to have.

V. Critical Evaluation

Washington II has significantly increased the tribal share of the fish resource over what they harvested immediately prior to the original 1974 *Washington I* decision. In recent years prior to 1974, Washington Indians were harvesting less than 2% of the fish, whereas now the tribes collectively harvest 50% of the resource.[102] As a result, *Washington I* has been touted a legal victory for the tribes.[103] Others, such as Joseph Pavel, do not see the case as a major legal victory bestowing on the tribes a windfall of fish or money. He sees the case as simply providing tribes with a choice to fish for a living or not to fish for a living.[104]

Clearly the conflict and the controversy is not over. What the decision did do, though, was change the character of the disputes. As noted earlier in this article, the disputes are no longer state versus tribe; the majority are inter-tribal and intra-tribal. *Washington II* has,

99. Interview with Gill Pauley, Chair of the Fisheries Advisory Board (Apr. 26, 1990).

100. Interview with Barbara Lindsay, Executive Director of the United Property Owners of Washington (Apr. 27, 1990).

101. Interview with Steve Robinson, *supra* note 93.

102. Interview with Phillip Katzen, *supra* note 72.

103. Interview with Mason Morrisett (May 2, 1990); Interview with Steve Robinson, *supra* note 93; Interview with Phillip Katzen, *supra* note 72.

104. Interview with Joseph Pavel, Fisheries Biologist, Northwest Indian Fisheries Commission (May 2, 1990).

in effect, pitted tribe against tribe,[105] while the issues that are in dispute are the very same issues that were disputed pre-*Washington I* — allocation disputes.

Every dispute that is currently pending boils down to a basic allocation dispute. Disputes of this nature will inevitably increase in terms of frequency and degree of animosity as the resource diminishes further. These disputes could have been avoided if the court had not made some basic mistakes.

Washington II is more correctly viewed as a short-term fix rather than a long-term solution. The treaty tribes have gained a right to 50% of the dwindling resource at the intolerable expense of a complete denial of traditional tribal fishing methods and systems, and at the expense of ensuring the long-term viability of the resource. "Without further clear and consistent guidance, the court victories claimed by any side in this controversy will be truly empty. For while the treaties are litigated and relitigated in court, constructive long-range planning suffers, the fish stocks dwindle, and everyone loses."[106]

The following sections will examine where the court went astray in the decision, why these mistakes are extremely detrimental to all tribes, how the tribes are impacted, and what the future holds for the tribes of Washington State.

A. The Nature of Indian Fishery Management Systems

Traditionally, Washington tribes managed fish through a proprietary fish tenure system that was based on ecosystem management principles. Under this system all the fishing sites were distributed among family groupings within the tribe. Such a fish tenure system effectively established a proprietary interest in the actual fishing site. Each family or tribe privately owned that particular harvesting site or ground where the stocks seasonally congregate.

This tenure system also served to distribute income within the tribe, thereby maintaining the class or social structure. While the site was privately owned, the gear was publicly owned in that it was constructed and maintained by the Indian community. For the river-based tribes, one large net would block the river and the catch was distributed according to the amount of effort put into preparation of the net for the harvest. In these societies, the advantageous downstream sites were usually reserved for high-ranking households. They acquired ownership

105. In competing for a dwindling resource, some federally recognized treaty tribes are actively sabotaging other tribes' efforts to become federally recognized. The fewer the number of federally recognized tribes, the greater the share of the 50% allocation for those tribes.

106. Landau, *supra* note 11, at 456.

of these more productive grounds as compensation for their extensive public duties and heavy community responsibilities.[107]

For ocean-based tribes, points of land that jut out into strategic marine migration paths were distributed among the main families of the tribe. The families that owned these sites also owned the gear used for harvesting and owned the catch. The harvest would be distributed among the family members and any nonmember that chose to help. This system was far more rank conscious than the river-based tribal system.

The simple fact that ownership of specific sites was vested in families provided them with a right to prevent others from preying on the stock elsewhere. Ownership of site then ensured ownership of the fish that returned. The owner had a vested interest in ensuring the long-term viability of the resource by protecting the ground's capital value. Survival of the stocks that seasonally pass through it was thus ensured.

The district court recognized the tribes engaged in both fixed site or land-based fishing and marine zone fishing. When interpreting the provision that reserved the tribes the right to fish at "all usual and accustomed grounds and stations," the court recognized that the words "grounds" and "stations" indicate two different approaches to fishing:

> "Stations" indicates fixed locations such as the site of a fish weir or a fishing platform or some other narrowly limited area; "grounds" indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined.[108]

Further, the court recognized that salmon and other anadromous species are the largest component of aboriginal tribal fisheries;[109] that the most strategic location for harvesting anadromous fish is in river mouths;[110] that the tribes relied heavily on the use of fixed, riparian gear;[111] and that the Indian fisheries are largely place-oriented.[112] While the court recognized all these elements, the court failed to link them together and understand them in relation to the broader context.

By not drawing all these pieces together, the court overlooked the *fact* that fixed sites were established for anadromous fisheries, and

107. Russel L. Barsh, *The Economics of a Traditional Coastal Indian Salmon Fishery*, 42 HUMAN ORGANIZATION 170, 171 (1982).

108. *Washington I*, 384 F. Supp. at 332.

109. *Id.* at 406.

110. *Id.* at 352.

111. *Id.* at 384.

112. *Id.*

that marine zones were established for non-anadromous fisheries.[113] This distinction is critical. Since a trap fishery is, by design, private property and a marine fishery is open and common to all fishers, it is logical that the tribes agreed to fish "in common with" non-Indians for non-anadromous species, and it is meaningless to describe a trap fishery as "common." If traps are not protected from marine competition, its special economic value is lost. Stemming from this oversight, Judge Boldt crafted his decision based on the mistaken assumption that tribal proprietary fishery management systems are based on the same theoretical underpinnings as the common property approach practiced by the state.

B. Reason Indians Were Excluded from the Fishery

Marine competition accelerated from the 1890s to the 1920s when non-Indian settlers flocked to the region and began large-scale development of the commercial fishing industry. In jockeying for a better fishing position, the fishers leapfrogged over one another gradually moving further offshore. As the non-Indians were moving further offshore to remain ahead of the other fishers, the tribes remained at their river mouth, land-based site, waiting for their fish to return. The stocks at that time were enormous, so there was little negative impact. Eventually, the stocks could not bear the extreme harvesting pressure and their numbers began to dwindle. Marine predation reduces the total number of fish everywhere along the migration path. Increases in offshore harvesting efforts means decreases in onshore harvesting activities because fewer fish survive to return to the rivers. This explains why the tribes were effectively cut off and excluded from the fishery.

The court, unfortunately, did not even consider why the tribes failed to compete successfully in this ever-evolving offshore marine fishery. In stating that "employment acculturation of the Indians has been a major cause of the drastic decline from treaty times of the number of Indians engaged in fishing,"[114] the court leaves the impression that Indians chose not to fish in preference to other forms of employment. To be sure, many Indians did stop fishing and found jobs within the dominant society, but this change in employment was due to necessity. It was truly the offshore marine fishing technique employed by the non-Indians that was instrumental in tribal exclusion from the fishery.

C. Court-Ordered Remedy

Washington I stated that off-reservation fishing by *non-Indians* "is not a right but merely a privilege which may be granted, limited, or

113. RUSSEL L. BARSH, THE WASHINGTON FISHING RIGHTS CONTROVERSY: AN ECONOMIC CRITIQUE 44 (1977).

114. *Washington I*, 384 F. Supp. at 358.

withdrawn by the state as the interests of the state or the exercise of treaty fishing rights may require."[115] The court further ruled that the treaties reserve for the Washington tribes a treaty right to fish, not a mere or simple privilege to fish. It is important to note that the court did not mean a right to the fish itself, but rather the right to the opportunity to engage in fishing itself. The right simply extends to the opportunity, rather than the property.

Under the tribal fishery management scheme, various Indians owned the fish. That ownership allowed them to exclude others from fishing their stocks, and provided the owner with incentive to be a careful steward and ensure the long-term viability of those particular returning stocks. But in only recognizing a tribal right to the opportunity to take off-reservation fish, the court approved the state's regulatory scheme, which includes the elimination of private ownership of sites and stocks. Therefore, if the Indian attempts to realize this right to fish, the fisherman must be willing and able to fish as the non-Indians fish and also must now compete within that foreign common-property system. As Russel L. Barsh notes, "[T]he court has implicitly *ratified* the state's taking of the value of tribal off-reservation trap sites and *compensated* tribes by *increasing their share of a less efficient*, predominantly marine state fishery."[116]

Further, the remedy did not consider the financial status of most tribes of the region at that time. Since the remedy provides Indians an equal opportunity to fish rather than an equal share of the proceeds of the fishery, it assumes Indians enjoy equal access to capital. For the Indians to take full advantage of the remedy, they must invest in additional gear. But if the real explanation for their lost harvesting amounts has been an inability to finance gear to compete with the growing non-Indian industry, then the court's remedy changes nothing.

The Bureau of Indian Affairs (BIA) now provides tribes with subsidized loans to buy boats and other necessary gear. While this loan program has answered the past problem of limited capital, it has created a new problem. Today, the problem for most tribes is becoming one of overcapitalization, a problem the non-Indian fishery has been faced with for many years. According to Gill Pauley, current chair of the Fisheries Advisory Board, the Makah Tribe may already be overcapitalized in that they cannot get access to enough fish to pay for the BIA boat loans.[117]

D. How Are the Tribes Affected?

If the court had clearly understood the facts that (1) tribal anadromous fishery is land-based, and (2) offshore fishing technique caused

115. *Id.* at 332.
116. BARSH, *supra* note 113, at 45 (emphasis in original).
117. Interview with Gill Pauley, *supra* note 99.

the decline in Indian harvests, then its legal conclusions would have been different. Had these facts been considered, most of the current conflicts referred to earlier in this article would have been avoided and the ruling would have been far more beneficial for the tribes overall. The most devastating effect of this decision was the court's implicit denial of a tribal land-based proprietary, anadromous fishery. By denying the Indian approach to fishery management, the court affirmed the non-Indian common property approach to fishery management. Tribes must now compete with non-Indian fishers in a non-Indian fishery system — a system foreign to Indian methods and far more inefficient economically.

The fishery resource is the bedrock of the Washington tribes' culture. The primary function of the Indian tenure system was to manage effectively the resource, but it was also instrumental in distributing income within the tribe which ultimately maintained and enforced tribal social structure. By disaffirming tribal fishery systems and forcing tribes to fish offshore as non-Indians, the court has launched a deadly blow attacking the very foundation upon which tribal culture and society is based and structured. Whether intentional or not, the effect is clear: tribal societies are being forced to change. Tribes are placed in a no-win situation. If tribes continue to fish, then they must fish according to non-Indian systems, foreign to their culture, and thus they must adapt socially and culturally to this new approach. If the tribes refuse to adapt to non-Indian methods, they are effectively denied the ability to fish altogether, thereby destroying the traditional lifestyle and culture. The choice is assimilation or obliteration.

This decision ultimately serves to assimilate tribes into the non-Indian fishing culture and to undermine the legitimacy of the very claim the tribes are making. While the decision upholds a tribal right to regulate their off-reservation fishery, it is wholly contingent on the tribes' willingness and ability to adopt the governmental forms and structures of the dominant society. Before a tribe can exercise off-reservation fishing rights, it must establish to the satisfaction of either the State Department of Fisheries, or the court, that the tribe meets certain qualifications.[118] These qualifications include competent and responsible leadership, well-organized tribal government, Indian personnel trained for and competent to provide effective enforcement of all tribal fishing regulations, well-qualified experts in fishery science and management either on the tribal staff or readily available to the tribe, and an officially approved tribal membership role.[119] By rationalizing the management of the Indian fishery in this way, the court is simply recreating the relationships of the dominant society. The court

118. *Washington I*, 384 F. Supp. at 333, 340.
119. *Id.* at 340-41.

does not see this rationalized control and management as an imposition of external values.

D. What Are the Long-Term Implications?

In 1965, Garrett Hardin labelled the problem all marine fisheries face as "the tragedy of the commons."[120] Marine fisheries are common goods because they cannot be reduced to individual ownership while in the ocean and must therefore belong to everyone (that is, if they are to be considered property at all). Individual ownership does vest, though, at the moment the animal is captured. The tragedy presents itself to economists in the form of a diseconomy and to environmentalists as overexploitation of the resource.

The diseconomy is the duplication of harvesting effort exercised by the fishers which results because no one pursuing a particular school of fish can exclude the other fishers until the fish are caught. All fishers bear search and pursuit costs, but only one fisher benefits. The other diseconomy that flows from this rule of capture is a reduced economic value of the fish. The capturer must either kill the prey, whereupon its value will begin to deteriorate, or sustain its life at some cost. The fish cannot remain at large until the best opportunity to market it.

Overexploitation is inevitable with common property resources. Since the resource is owned by all, there are no restrictions on who can harvest it. All owners have equal use rights. The system is based on competitive free enterprise principles, so it is not in the fishers best interests to save fish until they are larger or to act in any way to ensure adequate resource conservation and effectively promote the long-term economic viability. Clearly, no fisher gains by foregoing early harvests of smaller fish in favor of later forays, since others may fully harvest the undersized stocks. Fish then become "everybody's property and nobody's responsibility."[121]

Reflecting on the problem common property resources present, a state commission in 1919 complained that "the greed for fish makes cradle robbers of many of our fishermen."[122] But at what point do fishers stop engaging in this activity? Scott Gordon showed that the fishery could be expected to achieve a "bionomic equilibrium" at which point net economic revenue was zero.[123] The more valuable the

120. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243-48 (1968).

121. Stanton Patty, *Canada Working for Continental Shelf Limit on Fishing*, SEATTLE TIMES, Dec. 3, 1970, at 18.

122. 10 REPORT OF THE WASHINGTON STATE DEPARTMENT OF FISHERIES 1917-1919, at 28-29.

123. H. Scott Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 J. POL. ECON. 124-42 (1954).

catch, relative to the cost of fishing, the greater the resulting level of exploitation and of depletion of the stock. Therefore, unless strictly regulated, effort tends to expand to a level at which net economic benefits to fishers are entirely dissipated.[124]

Gordon's model suggests ways to solve this problem. First, control the fishing effort directly by limiting entry. Second, impose royalties on the fish harvest that would capture resource revenue for the public at large. Third, convert the open access fishery harvest into a property rights system.[125] None of these solutions have been attempted in Washington State.[126]

In Washington State, the traditional response has been what Professor Crutchfield aptly refers to as regulation by inefficiency.[127] As "inefficiency experts,"[128] fishery managers use time and area closures, gear restrictions, and species restriction, in an attempt to ameliorate the destructive effects fishers have on the common resource. But while annual quotas, season closures, and gear restrictions may prove adequate to reduce fishing mortality and maintain fish populations, these traditional regulations do not restrain the incentives to "race for fish" by expanding fishing capacity.[129]

Colin Clark, of the University of British Columbia, concludes "that achievement of satisfactory levels of economic efficiency is probably impossible unless some form of exclusive property rights or appropriate substitute, can be established with respect to the fishery resource."[130] This conclusion supports the third solution Scott Gordon identified in 1957, and is recognized in most academic circles to be the ultimate solution to the tragic problem of the commons.

Property rights-based systems to fisheries management are superior to common property-based systems because they focus on economic efficiency, thereby ensuring the long-term liability of the resource. The Indian fishery management scheme is a property rights-based system. The Indian land-based anadromous fishery is far more efficient because the gear required is far less expensive and complicated, the gear is fixed and does not require labor to operate, the salmon are fully

124. See appendix 2 of this article for a graphic display of Gordon's model.

125. *Id.*

126. Following Gordon's first solution, Canada has limited entry into the Pacific Ocean fishery. While this was politically very difficult to install, it has proven to be successful in protecting the resource while maximizing its economic return.

127. *See* JAMES A. CRUTCHFIELD & GIULIO PONTECORVO, THE PACIFIC SALMON FISHERIES: A STUDY OF IRRATIONAL CONSERVATION 127 (1969).

128. Ralph W. Johnson, *Regulation of Commercial Salmon Fishermen - A Case of Confused Objective*, PAC. NORTHWEST Q. 141, 142 (1964).

129. DANIEL HUPPERT, LIMITED ACCESS ALTERNATIVES FOR THE PACIFIC GROUNDFISH FISHERY 38 (National Oceanic & Atmospheric Administration Technical Report No. 52, 1987).

130. Colin Clark, Optimization Theory and Fishery Management 43 (unpublished paper) (n.d.) (available from the University of British Columbia).

matured and therefore at their largest size when caught, and there are no search costs because the salmon always return to the natal stream. Land-based methods utilizing traps and weirs can be operated at 3% to 5% of the cost of any marine method.[131] The other benefit is that the trap owner has a high degree of control over the escapement necessary to ensure a healthy and abundant stock next year. Even beyond these economic benefits, land-based fishing really makes intuitive sense. As Ralph Johnson observes, "hunting for salmon on the high seas is like chasing bees in a meadow. Why not wait until the bees return to the hive, or until the salmon return to their spawning stream?"[132]

The court in *Washington II* missed an opportunity to uphold the integrity of tribal culture and to ensure the abundance of the salmon resource. If the court had only affirmed the tribal approach to salmon management, it would be validating a far more efficient property-based system. Of course, a land-based fishery is only useful and effective if all marine harvesting activity is eliminated. As we have seen, the court failed to take this initiative. Is such an action within the court's discretion? Is this the function of the court?

VI. Conclusion

Legal scholars become concerned when the judiciary is faced with disputes which entail redistribution of an extremely valuable neutral resource. They are skeptical of the judiciary's capacity and ability to make sound decisions of this nature. Since these decisions have the potential of redistributing wealth, they expect resistance to any decision is likely. This resistance, in turn, increases the probability that the decision will be deflected into unanticipated channels and distorted in some perverse and unjust manner. The courts, some scholars contend further, are ill-suited to predict and control such consequences and even less suited to monitoring the results of their decisions. So that ultimately, given its inherent incapacities, the court in trying to "do right" is likely to "do wrong." The problem, as Donald Horowitz sees it, is rooted in the adjudicative process itself:

> Horowitz suggests that judicial capacity is limited by the nature of its personnel, who are generalists unsuited to processing specialized information and who tend to be isolated from the social milieu, and by the nature of the process, which is focused on rights and duties and is piecemeal, passive, lacking in fact-finding capability, and without provision for policy review.[133]

131. Johnson, *supra* note 128, at 141.

132. *Id.*

133. Rita Bruun, *The Boldt Decision: Legal Victory, Political Defect*, 4 L. & POL'Y Q. 271, 274 (1982) (construing DONALD HOROWITZ, THE COURT AND SOCIAL POLICY

United States v. Washington is clearly one of those disputes that concern legal scholars. A neutral and extremely valuable fishery resource was the focus of the dispute and treaty allocation rights was the central issue. Judge Boldt seemed to be aware, at least, of some of the inherent limits of the court in dealing with such a case. He clearly made a conscious effort to overcome these problems.

First, special effort was made to collect as much factual information as possible on every area of concern. As Judge Boldt explained:

> For more than three years . . . plaintiffs and defendants have conducted exhaustive research in anthropology, biology, fishery managements and other fields of expertise, and have also made extreme efforts to find and present by witnesses and exhibits as much information as possible that pertains directly or indirectly to each issue in the case.[134]

Second, Judge Boldt worked at facilitating feedback from all affected parties and provided a forum in which they could express their concerns. The court suggested that:

> . . . so far as possible, all tribes, agencies or organizations having or claiming direct or indirect justifiable interest in treaty fishing rights . . . be brought into the case either as parties or as amicus curiae; and that every issue of substantial direct or indirect significance to the contentions of any party be raised and adjudicated in this case.[135]

This approach helped him identify and clarify the dimensions and content of the problem.

Third, in anticipation of problems in implementing its decision, the court maintained continuing jurisdiction after deciding the case. Recognizing his lack of knowledge in the area of fishery science management, he appointed an expert and a special master to assist the court and the disputants in problems, questions, or other disputes flowing from the decision.

Exercise of continuing jurisdiction by a court is certainly not new or unusual. This remedy, however, is usually utilized in school desegregation cases. The increasing volume of cases involving environmental and natural resource issues suggests a growing role for the courts as administrative resource managers. As Judge Burns observed in his concurrence affirming *Washington I*,

> any decision by us to affirm also involves ratification of the role of the district judge as a "perpetual fishmaster."

134. *Washington I*, 384 F. Supp. at 328-29.
135. *Id.*

> Although I recognize that district judges cannot escape their constitutional responsibilities, however unusual and continuing duties imposed upon them, I deplore situations that make it necessary for us to become enduring managers of the fisheries, forests, and highways, to say nothing of school districts, policy departments, and so on.[136]

Before any agency can function properly, it must, at a minimum, have comprehensive jurisdiction, fixed lines of authority, effective means of enforcement, and resources to finance its activities. Courts do not have such means or resources and should, therefore, not move too hastily to assume comprehensive regulatory authority in a particular case.

Even with these extra efforts to overcome the problems disputes of this sort present for the court, it still made three fundamental mistakes. First, the court misunderstood that Indian anadromous fishery techniques are land-based and proprietary in nature. Second, it mistakenly assumed that Indians were excluded from the fishery due to employment acculturation. Third, based upon these two mistakes, the court designed a remedy inappropriate for the tribes. The remedy not only validates the dysfunctional state fishery, but it forces tribes to compete within this foreign system and fish in the same way non-Indians fish. But before capital poor tribes can enter the already overcapitalized state system, they must purchase boats and gear.

The optimal solution to *United States v. Washington* would have been allocation of sites and establishment of tradeable property rights in the sites, creating exclusivity, and a firm and perpetual division of wealth, thereby increasing the aggregate value of the resource for all parties. But the solution crafted by the court is less effective and involves far less change in the current state of affairs.

The matter has been dealt with most preceptively by Rita Bruun, who stated in a 1982 article that given the nature of the dispute and the inherent limits and constraints the court faces, "it is at least plausible that the [inadequacies of the decision and] the difficulties that have followed the Boldt decision are not the result of the court's failure to grasp the dimensions of the problem, but a function of the dimensions themselves."[137] She continues:

> Perhaps . . . the adjudicative process is too focused for rational policymaking. The court here focused on the rights and duties of the parties involved. Questions of rights tend to be considered absolute rather than utilitarian. As such, though the court heard from most interested parties, it could

136. 520 F.2d 676, 693 (9th Cir. 1975) (Burns, J., concurring).
137. Bruun, *supra* note 133, at 275.

> not consider an array of policy alternatives to maximize benefits for all parties.[138]

While the court would have found it difficult politically to justify "any policy that deviated greatly from either the 50% the tribes were claiming on the basis of treaty language or the absence of any right at all beyond the simple equal access that the senate was claiming,"[139] it does not preclude it from considering other policy alternatives altogether.

> Nevertheless, it seems that Judge Boldt could not imagine a management program that did not adhere to liberal values, such as efficient rule-centered management and accountability. The result of this failure of vision is likely to be an undermining of the very basis of tribal existence from within, as the tribes come to rely more and more on culturally foreign scientists, accountants, lawyers, and grant-proposal writers.
>
> As the internal structure of the tribes is increasingly undermined, the legitimacy of their claims, which are based on the distinctiveness of Indian culture, is also sabotaged. . . .
>
> . . . [T]hus, the Indians find themselves in a devil's dilemma. Faced with deprivation and harassment, they have little choice but to fight; in the act of fighting the battle is lost. Rights-centered litigation that entails the twin dangers of reaction and assimilation seems to hold little promise. It is, to use Scheingold's words, "a strategy of desperation rather than hope."[140]

138. *Id.*

139. *Id.* at 276.

140. *Id.* at 294-95 (quoting STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS 7 (1974)).

APPENDIX I

TREATY WITH THE NISQUALLI, PUYALLUP, ETC., 1854.

Articles of agreement and convention made and concluded on the Shenah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass. I Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and *Elliott Bays*; thence running in a south-easterly direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vasbon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's Inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any

United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE 3. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* that they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.

ARTICLE 4. In consideration of the above session, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years, two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year; and for the next five years twelve hundred dollars each years; and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 5. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to

be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE 7. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician

to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 11. The said tribes and bands agree to free all slaves not held by them, and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere our of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their bands and seals at the place and on the day and year hereinbefore written.

Isaac I. Stevens, [L.S.]
Governor and Superintendent Territory of Washington.

Qui-ce-metl, his x mark.	[L.S.]	Klo-out, his x mark.	[L.S.]
Sno-ho-dumset, his x mark.	[L.S.]	Se-uch-ka-nam, his x mark.	[L.S.]
Lesh-high, his x mark.	[L.S.]	Ske-mah-han, his x mark.	[L.S.]
Slip-o-elm, his x mark.	[L.S.]	Wuts-un-a-pum, his x mark.	[L.S.]
Kwi-ats, his x mark.	[L.S.]	Quuts-a-tadm, his x mark.	[L.S.]
Stee-high, his x mark.	[L.S.]	Quut-a-hen-msn, his x mark.	[L.S.]
Di-a-keh, his x mark.	[L.S.]	Yah-leh-chn, his x mark.	[L.S.]
Hi-ten, his x mark.	[L.S.]	To-lahl-kut, his x mark.	[L.S.]
Squa-ta-hun, his x mark.	[L.S.]	Yul-lout, his x mark.	[L.S.]
Kahk-tse-min, his x mark.	[L.S.]	See-ahts-oot-soot, his x mark.	[L.S.]
Sonan-o-yutl, his x mark.	[L.S.]	Ye-takho, his x mark.	[L.S.]
Kl-tehp, his x mark.	[L.S.]	We-po-it-ee, his x mark.	[L.S.]
Sahl-ko-min, his x mark.	[L.S.]	Kah-sid, his x mark.	[L.S.]
T'bet-ste-heh-bit, his x mark.	[L.S.]	La'h-hom-kan, his x mark.	[L.S.]
Tcha-hoos-tan, his x mark.	[L.S.]	Pah-how-at-ish, his x mark.	[L.S.]
Ke-cha-hat, his x mark.	[L.S.]	Swe-yehm, his x mark.	[L.S.]
Spee-peh, his x mark.	[L.S.]	Sah-hwill, his x mark.	[L.S.]
Swe-yah-tum, his x mark.	[L.S.]	Se-kwaht, his x mark.	[L.S.]
Cha-achsh, his x mark.	[L.S.]	Kah-hum-kit, his x mark.	[L.S.]
Pich-kehd, his x mark.	[L.S.]	Yah-kwo-bah, his x mark.	[L.S.]
S'Klah-o-sum, his x mark.	[L.S.]	Wut-sah-le-wun, his x mark.	[L.S.]
Sah-le-tatl, his x mark.	[L.S.]	Sah-ba-hat, his x mark.	[L.S.]
See-lup, his x mark.	[L.S.]	Tel-e-kish, his x mark.	[L.S.]
E-la-kah-ka, his x mark.	[L.S.]	Swe-keh-nam, his x mark.	[L.S.]
Slug-yeh, his x mark.	[L.S.]	Sit-oo-ah, his x mark.	[L.S.]
Hi-nuk, his x mark.	[L.S.]	Ko-quel-a-cut, his x mark.	[L.S.]
Ma-mo-nish, his x mark.	[L.S.]	Jack, his x mark.	[L.S.]
Cheels, his x mark.	[L.S.]	Keh-kise-bel-lo, his x mark.	[L.S.]
Knutcanu, his x mark.	[L.S.]	Go-yeh-hn, his x mark.	[L.S.]
Bats-ta-kobe, his x mark.	[L.S.]	Sah-putah, his x mark.	[L.S.]

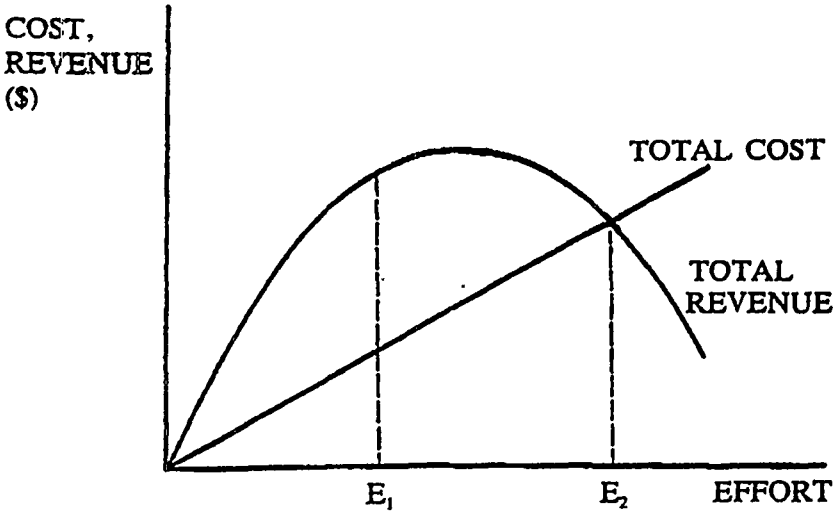
Win-ne-ya, his x mark. [L.S.]

William, his x mark. [L.S.]

Executed in the presence of us—

M.T. Simmons, Indian agent.
James Doty, secretary of the commission.
C.H. Mason, secretary Washington Territory.
W.A. Slaughter, first lieutenant, Fourth Infantry.
James McAlister
E. Giddings, jr.
George Shazer,
Henry D. Cock,
S.S. Ford, jr.,
John W. McAlister,
Clovington Cushman,
Peter Anderson,
Samuel Klady,
W.H. Pullen,
P.O. Hough,
E.R. Tyerall,
George Gibbs,
Benj. F.Shaw, interpreter,
Hazard Stevens.

APPENDIX II



H.S. Gordon's (1954) theory of the common-property fishery. In the absence of regulation, effort expands to E_2, where total cost = total revenue, and economic rents are "dissipated." The (zero discount rate) optimum would be at effort level E_1.